Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

ABDUL MAJEED KHATTAK,

Petitioner,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is there a retroactive effect when the Board of Immigration Appeals applies the Attorney General's October 18, 1999 modifications of the Immigration and Nationality Act, codified at 8 C.F.R. § 3.1(a)(7), reducing the level of review on appeal, to cases that were already pending on appeal prior to the modification and adoption date?

2. If there is a retroactive effect by applying the October 18, 1999 modifications of the Immigration and Nationality Act to cases already pending on appeal, does the Attorney General have the express authority to promulgate retroactive regulations under the Immigration and Nationality Act?

3. Does Mr. Khattak have a Constitutional right to an adversarial hearing to adjudicate his permanent residency application under the Seasonal Agricultural Worker's program?

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Petitioner, Abdul Majeed Khattak, respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit denying Petitioner's petition for review of the Board of Immigration Appeals summary affirmance of the Immigration Judge's oral decision (No. 02-1475) is dated June 13, 2003. [Appendix A].

The decision of the Board of Immigration Appeals denying the Petitioner's appeal of the Immigration Judge's oral decision (A91-365-567) is dated April 4, 2002. [Appendix B].

The oral decision of the Immigration Judge (A91-365-567) is dated November 20, 1997. [Appendix C].

GROUNDS FOR JURISDICTION

Petitioner began proceedings in the Executive Office for Immigration Review, United States Department of Justice, United States Immigration Court for Arlington, Virginia. In an oral decision dated November 20, 1997, the Immigration Judge denied all forms of relief. Petitioner appealed the final decision of the Immigration Judge to the Board of Immigration Appeals pursuant to 8 C.F.R. § 3.1(b) on December 17, 1997. On April 4, 2002, Petitioner received a final order from the Board of Immigration Appeals, which was a summary affirmance by a one-member panel of the Immigrations Judge's decision.

Jurisdiction to the United States Court of Appeals for the Fourth Circuit was invoked pursuant to 8 U.S.C. § 1252(b)(9). Under this section, Congress Authorized Circuit Courts within the jurisdiction in which the Immigration Court that made the final order lies to "[r]eview . . . all questions of law and fact, including interpretation and application of constitutional and statutory provision, arising from any action taken or proceeding brought to remove an alien from the United States . . ." *Id.* The United States Court of Appeals for the Fourth Circuit denied Petitioner's Petition for Review in a decision dated and June 13, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition for a writ certiorari raises issues regarding Due Process Clause of the Fifth Amendment to the United States Constitution and its application to 8 U.S.C. §§ 1160(e)(1) and (2) and 8 C.F.R. 3.1(a)(7).

STATEMENT OF THE CASE

Mr. Khattak is a Pakistani national who entered the United States by crossing the United States — Canada border at or near Buffalo, New York without inspection on or about July 1985. In 1988, Mr. Khattak applied for and was granted temporary residence in the United States under the SAW amnesty program. The SAW amnesty program allows certain aliens who perform farm labor to obtain permanent residency in the United States. *See* INA § 210, codified at 8 U.S.C. § 1160. In a letter dated April 25, 1990, the Immigration and Naturalization Service (heretofore "Service") approved Mr. Khattak's temporary resident status. The Service issued Mr. Khattak a temporary residence card on July 29, 1988, pursuant to the SAW amnesty program.

On June 21, 1990, the Service initiated proceedings to terminate Mr. Khattak's temporary residency status. The Service contended that Mr. Khattak's name was on a list of fraudulent applications submitted in a plea agreement by Bahauddin Khan Khattak to the United States District Court, Alexandria, Virginia. On September 19, 1990, the Service terminated Mr. Khattak's status as temporary resident alien, and informed him that he had 30 days to appeal the decision to the Administrative Appeals Unit by filing an I-694 Notice of Appeal. By and through counsel, Mr. Khattak filed a timely appeal and brief in support of his appeal. In a letter dated February 17, 1993, the Service informed Mr. Khattak that his appeal is "dismissed" and that the decision constituted a final notice of ineligibility.

Subsequent to the termination of his status as a temporary resident, Mr. Khattak filed two separate asylum applications. The first application was filed on August 10, 1995. Pursuant to 8 C.F.R. § 208.14(c) the Service referred the first application to the United States Immigration Court, in Arlington, Virginia, to allow Mr. Khattak to present his application for asylum to the Court. 8 C.F.R. § 208.14(c). Mr. Khattak, by and through counsel, conceded deportability, but as a form of relief from deportation, Mr. Khattak requested adjustment of status pursuant to INA § 210 as a special agricultural worker, suspension of deportation pursuant to INA § 244, asylum pursuant to INA § 208 and withholding of deportation pursuant to INA § 243(h).

On June 27, 1997, Mr. Khattak filed an additional asylum application with updated information and additional supporting documentation. Mr. Khattak presented his case before the United States Immigration Court on October 6, 1997. In Oral Decision, dated November 20, 1997, the Immigration Judge denied all forms of relief. The Immigration Judge ruled that he did not have jurisdiction to adjudicate the adjustment of status

application under the SAW program. Further, the Immigration Judge held that Mr. Khattak was incredible, and therefore denied the applications for asylum, and withholding of removal.

On April 4, 2002, the BIA affirmed, without opinion, the results of the decision below. In deciding the case at hand, the BIA employed a streamlined appellate review procedure allowing a single appellate adjudicator to determine the final decision, as promulgated in 64 FR 56,135, codified at 8 C.F.R. § 3.1(a)(7). Prior to the Department of Justice's regulatory modifications in October of 1999, the BIA was required to have at least three individual board members review each case that was appealed. 64 FR 56,135. Additionally, the BIA was required to submit a detailed brief that outlined the pertinent legal issues before the Board. *Id.* When Mr. Khattak conceded deportability in Immigration Court proceedings he relied the standard of review that at least three Board Members would review his case and issue a detailed analysis of their decision. The BIA, however, retroactively applied a new standard of review to Mr. Khattak's pending appeal.

Mr. Khattak filed a petition for judicial review with the United States Court of Appeals for the Fourth Circuit. The Court of Appeals denied the petition for judicial review on June 13, 2003. The Fourth Circuit found that the streamlined review procedure employed by the BIA did not have a substantive effect on Mr. Khattak, and therefore did not operate retroactively. Furthermore, the Fourth Circuit determined that there was no constitutional right to an adversarial hearing when Mr. Khattak's temporary residency status under the SAW program was terminated.

Petitioner now seeks review by this Court.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted Because The United States Court Of Appeals For The Fourth Circuit Erred When It Determined That There Was Not A Retroactive Effect When The Board Of Immigration Appeals Applied The October 18, 1999 Regulations To Mr. Khattak's Already Pending Appeal.

This matter presents significant issues of concern to this Court in the proper mechanism of review that the Board of Immigration Appeals must apply to already pending appeals. The reduction in the amount of individual Board Members that must review each case has a substantive effect on the outcome of the aliens appeal.

The Department of Justice enacted two regulatory modifications of the standard and powers of review of the BIA. The first of such modifications was formally adopted and published in the Federal Register its final form on October 18, 1999. 64 FR 56,135, *et seq*., subsequently codified at 8 C.F.R. § 3.1(a)(7). The effective date for the rule promulgated was also October 18, 1999. *Id.* The result of this modification was a streamlining of the appellate review procedure of the BIA. *Id.* Two very significant changes were effected due to the October 18, 1999 modification. The first allowed the BIA to reduce the number of Board Members required to review each appeal from at least three members to a single member. *Id.* The second significant change was that Board Members could summarily affirm the lower Court's decision without opinion.

Prior to the adoption of this rule, each individual case was reviewed by a panel of a minimum three Board Members,

and if a case presented significant or important issues it could be reviewed en banc by the entire Board. *Id.* Upon consideration of the three-member or en banc panel, the BIA would draft and provide to the alien a detailed decision regarding the merits of their case. *Id.* This detailed decision provided the alien, as well as counsel, a wealth of information and assured the effective assistance of counsel in future legal arguments. From the decisions, both aliens and their counsel could develop legal strategy and determine how the Board interpreted a particular statute, regulation or legal argument in grand scheme of immigration law.

The first step in an analysis to determine if a statute has an impermissible retroactive effect is to define "retroactivity." A statute or regulation does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment. *Landgraf v. USI Film Prods*, 511 U.S. 244, 269 (1994). Instead, when determining whether a statute or regulation operates retroactively one must determine if there is a substantive effect based upon "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 280. The above concept is based on the firmly rooted principle that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. *Id.* at 265. Recently the Supreme Court reiterated their opinion that the judgment whether a particular procedure operates retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations in *Immigration and Naturalization Service v. Enrico St. Cyr*, 533 U.S. 289 (2001) *referring to Martin v. Hadix*, 527 U.S. 343 (1998).

The de novo review by at least three members of the Board in conjunction with the BIA's written decision, as well

as the Immigration Judge's oral decision gave the alien a great deal of information upon which to base their strategy of appeal to the Federal Court of Appeals. Understanding the guarantees of procedural due process of law once an appeals procedure has firmly taken root, and based on one of the most important cannons of practicing law, many counselors saw this mechanism as the most effective way to zealously represent their clients' legitimate claims to remain in the United States. As a result, when determining what course to proceed in the context of immigration law, many counselors could have tailored their advice, practice and guidance to clients in reliance on the above-established procedure.[1]

Naturally as a direct consequence, many alien individuals, often based on the strong recommendation of counsel, opted to proceed with their legitimate asylum claims, instead of employing other legal mechanisms to attempt to remain in the United States of America. They did this in reliance on the vast procedural appeals that were afforded: first, the alien has a hearing and received an opinion at the trial level; second, the alien had the option of another round of de-novo review from at least a three-member panel of the BIA that provided a very detailed opinion of the case; and third, the alien had an additional chance to appeal to the United States Court of Appeals for their circuit armed with both the opinion of the Immigration Judge, and the BIA.

While it is generally understood that there is no statutory right to appeal, it is also understood that this power does not allow an agency to maintain a procedurally deficient appellate process. *Evitts v. Lucey*, 496 U.S. 387, 400 (1985). Once a

1. It should be noted that during the five years from 1992 to 1997 the number of appeals increased by four times. 67 FR 54,878.

particular appeals process is established and universally applied by an agency it is clearly reasonable to rely upon that process being applied to each individual appeal. Obviously, the failure to consistently apply a universal appeals process would naturally result in the creation of a procedurally deficient appellate process.

Additionally, once Congress creates a system of entitlements and promulgates rules, which restrict the discretion of administrative officers to grant benefits under the system, a property interest is created that is accorded procedural due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972). Therefore, once Congress allowed the Attorney General to promulgate rules and regulations that give administrative officers the discretion to make decisions on an alien's appeal, a property interest is thus created that is accorded procedural due process protection. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (Congress can create substantive entitlement to a particular government benefit through enactment of legislation). The right to a universally applied standard of appeal is essential, and the Court should not allow an administrative agency to disrupt such settled expectations.

Reducing the de novo review from at least three Board Members to simply one Board member has significant substantive implications to the level of review afforded to Mr. Khattak. It has long been a tradition within our judicial framework that increasing the amount of fact finders results in an increase in the possibility of a correct verdict. In *Ballew v. Georgia* this Court reversed the position that there is "no discernible difference between the results reached by the two different-sized juries." *See Ballew v. Georgia*, 435 U.S. 223 (1978), citing *Colgrove v. Battin*, 413 U.S. 149 (1973).

In doing so, the Court cited empirical data showing that progressively smaller juries are less likely to foster effective group deliberation". *Ballew v. Georgia*, 435 U.S. at 233. Further, the Court stated, "the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result."[2] *Id.*

While this Court's decision was made in the context of a criminal prosecution, the reasoning set forth is universal: a smaller fact finding group results in a greater chance of an inaccurate result. The BIA had the power to review issues of fact de novo, and therefore functioned very similar to a jury. Decreasing the number of Board Members that reviewed each case increased the possibility of an inaccurate result, and certainly decreased the level of review that Mr. Khattak relied upon when he conceded deportability before the Immigration Court.

The Fourth Circuit Court of Appeals makes the distinction in their decision in the case at hand that the Board Members are professionals who adjudicate immigration cases regularly as contrasted with jurors, who are generally untrained in the law and for whom jury duty is an uncommon experience. *Khattak v. Ashcroft*, No. 02-1475, * (4th Cir. 2003). While it is true that the Board Members are professionals at adjudicating asylum claims, that does not mean that a reduction in the amount of individuals who review a case has any less of a detrimental effect as expressed in *Ballew v. Georgia*.

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2. The Court even notes that it is not necessary or possible to logically explain why reducing the number of fact finders results in an increase in the possibility of an inaccurate result: "we readily admit that we do not pretend to discern a clear line between six members and five."

The critical issue this Court relied upon in reaching the outcome in *Ballew* was the theory that smaller groups foster less effective group deliberation. Essentially, this Court found that reducing the group that deliberates has substantive effects on the outcome of a case. It does not matter whether the group is a group of experts or not, there are still substantive effects when a new system is created that fosters less effective group deliberation. There is no empirical data to suggest this is true, nor is there anything contained on the record that would support this position. In fact, one could even argue that Board Members, over time, would likely become desensitized to the horrors that occur to individuals who are claiming asylum, making the reduction in the amount of people who review the case even more critical.

Finally, the Fourth Circuit also erred in their logic when they found that it was critical to the Petitioner's case that the only appeals adjudicated by a one Board Member are those that have been determined to be the easiest cases. *Khattak v. Ashcroft*, No. 02-1475, * (4th Cir. 2003). The error in this logic is illuminated when considering that under the October 18, 1999 modifications, a single Board Member makes the decision of whether there are issues that are difficult and require review from a three-member panel. Again, a reduction from three people automatically reviewing every appeal, to a single person reviewing it in order to decide whether it is an easy case has the same substantive result — less effective deliberation that leads to a greater likelihood of an inaccurate result.

II. Certiorari Should Be Granted Because Immigration And Nationality Act Does Not Permit The Attorney General To Enact Retroactive Regulations Nor Does It Permit The Board Of Immigration Appeals To Apply Regulations Retroactively.

The desirability of judicial avoidance of constitutional conflicts with Congress and the President suggest that statutes should be interpreted where possible to preclude retroactivity. *Jones v. United States*, 526 U.S. 227 (1999). Additionally, when there are any lingering ambiguities in deportation statutes the ambiguities must be interpreted in favor of the alien. *INS v. Cordoza-Fronseca*, 480 U.S. 421, 449 (1987). Therefore, the first question the Court must consider is whether the regulation is legally justified under statutory direction.

In *United States v. Larionoff*, this Court concluded that even if the Court ultimately chooses to accept the agency's interpretation of a regulation, it must first be determined whether the regulation itself is consistent with the statute under which it was promulgated. *United States v. Larionoff*, 431 U.S. 864, 873 (1977). Further, regulations that are inconsistent with the statute, or contrary to the manifest purposes of Congress in enacting the statute, must be set aside as contrary to law. *Morton v. Ruiz*, 415 U.S. 199 (1974). If the regulation is not legally justified under the statute under which it is promulgated, the Court can avoid the constitutional conflicts with the legislative and executive branch.

The BIA's creation is a manifestation of the Attorney General's task of administration and enforcement of the Immigration and Nationality Act under INA § 103(a), codified

at 8 U.S.C. § 1103(a). This section, in effect, allows the Attorney General to "establish regulations and prescribe procedures as he [or she] deems necessary for carrying out [their] authority under the provisions of this chapter". INA § 103(a)(3). Additionally, the Attorney General may require or authorize any employee of the Department of Justice to perform the powers or duties that the Attorney General creates under the authority of the Act. INA § 103(a)(4). It is evident that these two sections give the Attorney General fairly broad authority to create and administer rules and regulations relating to the enforcement of the Act. However, even with this broad grant of authority, it does not grant the right to the Attorney General to create regulations that are retroactive in effect.

A longstanding tradition in statutory interpretation is that any retroactive application is disfavored: "The first rule of construction is that legislation must be considered as addressed to the future, not to the past." *United States v. Heth*, 7 U.S. 399 (1806). In *Georgetown University Hospitals*, this Court summed up the basic maxim by stating that for a statute to authorize the creation of retroactive effects the statute's language must require that it be applied retroactively. *Bowen v. Georgetown University Hospital, et al.*, 488 U.S. 204, 208 (1988). Their there must be a clear articulation by Congress that the agency has the power to apply laws retroactively, and absent such an articulation, the agency does not possess such power. *Id.*

A statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *Id.* Therefore, the Attorney General must have the specifically expressed power to promulgate retroactive rules within the statute. A thorough reading of the statute indicates that the Attorney General has

not been granted in express terms, the authority to promulgate retroactive rules, and therefore one can assume that Congress did not intend for the Attorney General to have such authority.

In *Immigration and Naturalization Service v. Enrico St. Cyr* this Court ruled on the inability of BIA to retroactively apply the non availability of the § 212(c) discretionary waiver, the United States Supreme Court affirmed the position in *Immigration and Naturalization Service v. Enrico St. Cyr*, 533 U.S. 289 (2001). As indicated above, this Court in *St. Cyr* ruled that there was no clear articulation that unmistakably indicated that Congress had considered the question of retroactive application of the statute. *Id.* at 326. Therefore, *Chevron* does not provide an argument for judicial deference in retroactive application because the main requirement of retroactive application is that it be specifically, expressly, and clearly articulated. *Id.* at 320 *citing Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 387 (1984). Without such a clear indication, the Court found that Congress failed to make its intention plain, and thusly the statute could not be construed to apply retroactively. *Id.* at 326.

Mr. Khattak relied on a particular standard of review when he conceded deportability before the Immigration Court. Allowing the Attorney General to alter that standard while Mr. Khattak has an appeal pending at the BIA is unfairly retroactive. Thus the desirability of judicial avoidance of constitutional conflicts with Congress and the President suggests that the statute should be interpreted where possible to preclude retroactivity to the petitioner. *See Jones v. United States*, 526 U.S. 227 (1999). Any doubt on the issue of statutory construction is to be resolved in favor of avoiding those constitutional questions. *Id.*

As stated previously, this vastly different practice of allowing one Board Member to review a decision, and respond with a one-line order was not adopted until October 18, 1999. However, as soon as the regulation was adopted, the Board The Board of Immigration Appeals began applying the above-described regulatory modification retroactively to matters that were pending on appeal. This practice goes against common sense, and the Supreme Court's previously formulated rationale on retroactivity: "the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Landgraff*, 511 U.S. at 265. Moreover, this Court clearly stated in *Heckler v. Community Health Services of Crawford County, Inc.* that: "an administrative agency cannot apply a new rule [or legislatively interpret a statute] retroactively when to do so would unduly intrude upon reasonable reliance interests." *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). Mr. Khattak reasonably relied upon the appellate process and procedure in place when he filed his case for asylum and appealed to the BIA prior to the adoption of the October 19, 1999 modification.

While traditionally an agency's interpretation of their own rules is given a large degree of judicial deference, this is not always the case. This Court articulated this rule very clearly in *Northern Indiana Public Service Co. v. Porter County Chapter of Izaak Walton League of America*, finding that judicial deference to an agency's interpretation of its own regulations is not total, and the Court must still examine the agency's interpretation to determine if it is consistent with the language of the regulation and with the purpose which the regulation is intended to serve. *Northern Indiana Public Service Co. v. Porter County Chapter of Izaak Walton*

League of America, Inc., 432 U.S. 12 (1975). The BIA's interpretation of the regulation in question is plainly erroneous and inconsistent with the clearly articulated authority.

After a thorough review of the final expression of the modification of procedure as published in the Federal Register, it is evident the rule is absent of any mention of the availability of applying the new procedure to previously filed and currently pending appeals. *See* 64 FR 56,135. In fact, the majority of the discussion is forward-looking, and explaining the fear of the BIA that future appeals will continue to increase in accordance with current statistics. *Id.* The BIA and the Department of Justice used the discussion in the Federal Register to paint a dark picture of the future existence of the BIA if it were not allowed to streamline their review mechanisms for future case. Amongst all of their dire predictions they never once clearly and distinctly stated that the modification would be applied to currently pending appeals. *Id.* In line with the rule clearly set forth in *Georgetown*, the Court should not interpret the BIA's authority to encompass the power to promulgate retroactive rules.

Further, *Georgetown* stresses that even if an agency can articulate substantial justification for retroactive rulemaking the courts should be reluctant to find such authority. *Georgetown University Hospital et al.*, 488 U.S. at 208. *Georgetown* therefore requires that even if the Department of Justice had specifically mentioned substantial justifications for why they wanted to apply the rule retroactivity (which they did not) the courts should still be reluctant to find no such authority absent an express statutory grant. *Id.* As a result of the overwhelming precedence above, courts should not engage in judicial deference to unreasonably interpreted authority attempting to retroactively apply regulatory modifications.

Additionally, in *Immigration and Naturalization Service v. Enrico St. Cyr*, this Court reviewed the question of whether the *Chevron* Doctrine required a show deference to the BIA's interpretation that they could apply a statutory modification retroactively. See *Immigration and Naturalization Service v. Enrico St. Cyr*, 533 U.S. 289 (2001), *referring to Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 387 (1984). However, this Court found that the Court must "only defer to agency interpretations of statutes that, applying the normal tools of statutory construction, are ambiguous." *Enrico St. Cyr*, 533 U.S. at 320 n.45. The Court continues by stating: "Because a statute that is ambiguous with respect to retroactive application is construed under the precedence to be unambiguously prospective, *Landgraf*, 511 U.S. at 264, there is for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." *Id.* at 320. Simply stated, *Chevron* does provide an argument for judicial deference in retroactive application because the main requirement of retroactive application is that it be specifically, expressly, and clearly articulated.

Vitarelli v. Seaton determined that fairness requires administrative bodies abide by their rules until they are lawfully changed by law. *Vitarelli v. Seaton*, 359 U.S. 535, (1959). Court's have clearly indicated that this theory is especially important when an individual or company reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially due to their reliance thereon. *United States v. Caceres*, 440 U.S. 741 (1979). As thoroughly discussed above, Mr. Khattak, and many others in his situation, reasonably relied on the procedures available to him through the BIA at the time of his appeal. Most important of these procedural differences was the reliance that each individual appeal would be

reviewed by at least three Board Members, and the BIA would issue a detailed case opinion based upon the facts of his case. The BIA did not have the required express authority to apply the modified regulations retroactively, and by doing so violated Mr. Khattak's procedural due process of law.

III. Certiorari Should Be Granted Because The United States Court Of Appeals For The Fourth Circuit Erred When It Determined That There Was Not A Constitutional Right To An Adversarial Hearing To Adjudicate Petitioner's Saw Application.

The Special Agricultural Workers (SAW) program was promulgated as part of the Immigration Reform and Control Act of 1986. *See* H.R. Conf. Rep. No. 99-1000, 99th Cong., 2d Sess. 95, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649, 5840, 5850-51. The law establishes a seven-year program for the adjustment and admission of foreign agricultural workers to meet the special labor needs of American growers of perishable commodities. INA § 210. The program directed the Attorney General through the Service to adjust the status of any qualifying alien to that of an alien admitted for temporary residence. *Id.* An alien that is granted temporary residence under the SAW program was ultimately eligible for admission as a permanent resident. *Id.*

This is a constitutional challenge to Sections 210A(e)(1) and (2) of the Immigration and Nationality Act, 8 U.S.C. §§ 1160(e)(1) and (2). Subsections (e)(1) and (2) violate Mr. Khattak's due process rights under the Fifth Amendment to the United States Constitution. The analysis set forth in this writ is a straightforward *Matthews v. Eldridge*, balancing test.

In *Matthews v. Eldridge* this Court set forth a three-part test to determine whether due process is being violated. *Matthews v. Eldridge*, 424 U.S. 319 (1976). First, this Court examines the private interest of the individual. *Id.* Second, this Court examines the likelihood of an erroneous determination without the added process advocated. *Id.* Thirdly, this Court balances the private interest of the individual, the likelihood of an erroneous adjudication against the government burden in the additional process. *Id.* Conducting this balancing test, it is evident that Mr. Khattak has a constitutional right to apply for adjustment of status under the SAW program in Immigration Court.[3]

That Mr. Khattak has a protected constitutional right to a fair hearing on his SAW application is beyond dispute. This Court in *McNary v. Haitian Refugee Center, Inc.*, 489 U.S. 479, 490-91 (1991) held that SAW applicants have a right to a fair hearing.

Mr. Khattak has a strong interest in having an Immigration Judge adjudicate his SAW. Mr. Khattak's private

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3. The SAW application process is as follow. The alien presents an application for adjustment of status to either the INS or the Qualified Designated Entity or QDE. The alien is scheduled for an interview with the Legalization Officer (LO), who is an INS officer. 8 C.F.R. § 210.2(c)(2)(iv). Based on the preponderance of the evidence, the LO could grant or deny the application. In case of a denial, the alien has only one avenue of administrative review. INA § 210A(e)(2). The sole form of administrative review is by filing an appeal to the Administrative Appeals Unit. 8 C.F.R. § 210(f). The statute allows an alien to file a petition for review in federal court if he has a deportation or exclusion order and under an "abuse of discretion" standard. 210A(e)(3).

interest in a fair hearing is of the utmost importance. As this Court held in *McNary*,

> [i]t is undisputed that SAW status is an important benefit for a previously undocumented alien. This status not only protects the alien from deportation; it also creates job opportunities that are not available to an alien whose application is denied. Indeed, the denial of SAW status places the alien in an even worse position than he or she was in before the Reform Act was passed, because lawful employment are no longer available to such persons. Thus, the successful applicant for SAW status acquires a measure of freedom to work and live openly without fear of deportation or arrest that is markedly different from that of the unsuccessful applicant. Even disregarding the risk of deportation, the impact of a denial on the opportunity to obtain gainful employment is plainly sufficient to mandate constitutionally fair procedures in the application process.

Id. at 490-491.

The chance of an erroneous adjudication is stamped in every page of this record. Mr. Khattak's SAW application was denied because a convicted felon, in a plea bargain agreement, told the authorities that he prepared a fraudulent SAW for Mr. Khattak. Knowing the impossibility of proving a negative, Mr. Khattak submitted an affidavit stating that he actually worked at the farm where he stated he worked. Further, Mr. Khattak's employer submitted a letter stating that Mr. Khattak was employed at the farm.

Mr. Khattak had no opportunity to cross-examine the convicted felon. Mr. Khattak submitted the only evidence possible in this type of case, a statement from him and his employer that he legitimately worked in the farm. Nonetheless, the INS officer gave more weight to the word of a convicted felon than to Mr. Khattak and his employer. Apparently the Service felt that the standard for sufficient procedures to protect the due process rights acquired through the approval of a SAW program application are so weak that mere unsubstantiated accusations by a convicted criminal are enough to revoke the approval without allowing the individual a meaningful opportunity to rebut such accusations.

In an adversarial hearing, Mr. Khattak would have been able to discredit the negative information about his SAW application. *See Ford v. Wainright*, 477 U.S. 399, 411 (1985). *See also Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine witnesses.")

Finally, the administrative cost to the government is minimal in this matter. Mr. Khattak is not requesting this Court to hold that he is entitled to the creation of a separate tribunal to adjudicate SAW applications. Mr. Khattak is requesting this Court to hold that as a matter of due process, an Immigration Judge, who routinely hears permanent residence applications to adjudicate one more, this time under the SAW program. In this manner, Mr. Khattak's SAW application could be adjudicated in an adversarial hearing and under the protected due process guarantees contained in the Fifth Amendment's Due Process Clause.

In the denial of the petition for review, the Fourth Circuit Court of Appeals clearly misunderstood the nature of this straightforward claim. As the Court of Appeals stated in a footnote: "He [Mr. Khattak] nevertheless conclusorily asserts that denying him the right to make his due process challenge in the immigration court was 'unconstitutional.' We find no basis to support that conclusion." *Khattak v. Ashcroft*, No. 02-1475, * (4th Cir. 2003).

The problem with the Fourth Circuit's analysis is that Mr. Khattak never argued that the Immigration Court has jurisdiction to adjudicate this constitutional claim. As is evident from the petition for review and the briefs filed in this case, Mr. Khattak asserts that federal courts have jurisdiction to adjudicate whether subsections (e)(1) and (2) meet constitutionally mandated standards by depriving him of presenting his SAW application to the Immigration Judge. At no point did Mr. Khattak assert that the Immigration Court has jurisdiction to decide the constitutionally of a statute.

The Court of Appeals also dismissed Mr. Khattak's constitutional claim because he could have filed his due process challenge in federal district court. The fact that Mr. Khattak could file an action in federal district court does not mean that he cannot raise a constitutional challenge in the Court of Appeals. In fact, the statute almost mandates Mr. Khattak to file a constitutional challenge in the Court of Appeals as opposed to district court. For example, Section 242(b)(9) states:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions arising from any action taken or proceeding brought to

> review an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

Further, Section 242(b)(2) states:

> The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration completed the proceedings.

By a simple reading of these two subsections, Mr. Khattak was correct in filing the constitutional challenge in the Fourth Circuit Court of Appeals. Mr. Khattak seeks to challenge the application of the SAW program as it violates his constitutionally protected rights under the Fifth Amendment. Section 242(b)(9) in simple terms states that such challenges must be brought in a petition for judicial review. Further, Section 242(b)(2), also in unambiguous terms, states that such petition for review must be filed with the court of appeals.

Relying on this Court's decision in *McNary* to hold that district courts have exclusive jurisdiction to review a constitutional claim is misguided for two reasons. First, as it is argued *supra*, the court of appeals clearly have jurisdiction to adjudicate constitutional claims. Second, unlike the facts in *McNary*, Mr. Khattak does not believe that the district court must conduct a fact finding on whether his constitutional rights were violated. Whether Mr. Khattak's constitutional rights were violated are purely legal issue and the court of appeals is just as competent to conduct a *Matthews v. Eldridge* analysis as a district judge.

This Court has clearly and consistently held that aliens are entitled to Fifth Amendment due process protection. Aliens are not to be deprived of their life, liberty or property without due process of law, even if removal is all but required. *Serrano v. Estrada*, 201 F. Supp. 2d 714, 720 (N.D. Texas 2002) *citing Chew v. Colding*, 344 U.S. 590, 596-97 (1953). Mr. Khattak was denied a reasonable opportunity to rebut the accusations that he committed fraud in the application process.

CONCLUSION

Wherefore, for the reasons articulated above, Petitioner Abdul Majeed Khattak request of this Court that it grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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